



COASTAL RESOURCES DIVISION

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September 11, 2024

Dr. Carolyn Good, Cetacean & Pinniped Conservation
NOAA Fisheries, Office of Protected Resources
Caroline.Good@noaa.gov

RE: Coastal Zone Management Act Regional Consistency Determination Objection: Proposed Rule to Amend the North Atlantic Right Whale Vessel Strike Reduction Rule

Dear Dr. Good:

Staff of the Georgia Coastal Management Program (GCMP, the Program) has reviewed the June 18, 2024 regional consistency determination for the proposed amendments to the North Atlantic Right Whale (NARW) Vessel Strike Reduction Rule (“speed rule”), along with the July 2022 Draft Environmental Assessment (DEA); July 2022 Draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis; August 2022 proposed rule; public comments submitted to NOAA between August 1, 2022 and October 31, 2022; January 2023 NOAA request for Georgia’s Coastal Zone Management Act (CZMA) relevant enforceable policies and reasonably foreseeable effects (along with our February 22, 2023 21-page response); and 16,091 public comments submitted to GCMP between July 16, 2024 and August 15, 2024, in the form of 57 unique comments, 2 template letters and one petition signed by 15,460 people.

I. NOAA Request for Public Comments:

The August 1, 2022 proposed Amendments to the NARW Vessel Strike Reduction Rule (87 FR 46921) invited public comment on several specific areas, including but not limited to:

- Mandatory Dynamic Speed Zones (DSZs):
 - Other effective means for notifying the public;
 - Geographic areas that should be subject to DSZs;
 - Appropriate design of trigger thresholds using confirmed right whale acoustic and/or visual detections;
 - Appropriate methodology for determining special extent as it relates to the greater than 50% likelihood standard for presence; and
 - The forms of notice mariners would find most practicable for receiving timely declarations of new DSZs.
- Updates to Safety Deviation Provisions:
 - Proposed reporting requirements;
 - Whether a web-based reporting mechanism is practicable for mariners;
 - Who should be responsible for completing and attesting to reports; and

- Requiring more robust logbook recordkeeping in lieu of the new reporting requirements proposed.
- Stakeholder Considerations:
 - Impacts of the proposed rule; and
 - Degree to which the mandatory speed limit (>35' vessels) may impact recreational angling within the active proposed SSZ (Seasonal Speed Zone) and DSZ (Dynamic Speed Zones).
- Classification:
 - Potential economic, operational or safety impacts from the proposed changes.

It was anticipated the June 18, 2024 regional federal consistency determination would address public input and/or offer additional scientific data on the above referenced topics by proposing a different Preferred Alternative¹ and/or modifying the amendments² to better balance reasonably foreseeable effects to coastal uses with regulations, whose intended purpose is to reduce the likelihood of mortalities and serious injury to NARW from vessel strikes. However, no additional data analysis or recommended modifications have been provided since the July 2022 DEA. The regional consistency determination simply states that the amendments were informed by a coastwide collision mortality risk assessment, updated information on NARW distribution, vessel traffic patterns, and vessel strike mortality and serious injury events.

II. Georgia Coastal Management Program - Recommendations:

The CZMA was intended to cause substantive changes in federal agency decision-making within the context of the discretionary powers residing in such agencies.³ Its federal consistency provisions apply not only to coastal resources, such as NARW, but also to coastal uses, such as fishing, recreation, and commerce. Therefore, federal consistency is more than just a procedural dictate; it helps ensure a balance between uses and protections.⁴

Comments were solicited by NOAA January 23, 2023 regarding reasonably foreseeable effects of the proposed amendments to Georgia coastal uses and resources. The February 22, 2023 response letter included the requested information along with recommendations to better balance effects to coastal uses and coastal resources. Over 16,000 comments were collected during Georgia's public comment period⁵. Both inform the recommendations below to further improve or clarify the proposed amendments:

a. Mandatory 10-Knot Dynamic Speed Zone (DSZ) Triggers:

¹ Alternative 1: no action; Alternative 2: restrict speed for vessels >35' within existing SMAs; Alternative 3: create new SSZs and keep speed restrictions to >65' vessels; Alternative 4: restrict speed for vessels >35' within existing SMAs and establish mandatory DSZs; and Alternative 5: Preferred Alternative – create new SSZs, add vessels >35' - <65', and establish mandatory DSZs.

² CRD February 22, 2023 letter, page 6: "We look forward to reviewing a revised rule based on scientific data that more reasonably balances NARW vessel strike risk and impacts to Georgia's coastal uses."

³ 15 CFR 930.32(a)(2)

⁴ CZMA Federal Consistency Overview, February 24, 2020, NOAA Office for Coastal Management, page 7.

⁵ July 16, 2024 – August 15, 2024.

It is proposed that DSZs would be triggered when a group of three or more right whales are sighted in close proximity. Modifying the trigger to include sighting of mother/calf pairs due to their slow swim speed and long residency times for waters south of Cape Hatteras would further reduce the likelihood of mortality or serious injury to NARW from vessel strikes.⁶

b. Updates to Safety Deviation Provisions:

A new provision is proposed, applicable only to vessels less than 65', to allow vessels to transit at speeds greater than 10 knots within areas where a National Weather Service Warning is in effect for wind speeds exceeding those that trigger a Gale Warning. Special Marine Warnings⁷, for hazardous weather conditions of short duration and capable of producing wind speeds of 34 knots or more, should be included in the list of Warnings that allow safety deviations.

c. Enforcement and Compliance:

The US Coast Guard does not require Automatic Identification System (AIS) on vessel under 65' and their official stance is "Notwithstanding that the Coast Guard strongly encourages the use of AIS, we have no plans to expand AIS carriage beyond our current regulations"⁸. NOAA Office of Law Enforcement will need to consider what burden of proof is acceptable to establish a violation for enforcement of the proposed regulations if vessels without AIS are included within the Rule. We strongly recommend that NOAA work with federal and state law enforcement agencies to develop a realistic enforcement plan and craft the final rule accordingly.

d. Improve NARW Detection:

New technologies for visual and acoustic detection of NARW, such as "sail drones", should be further investigated to improve both locating NARW and notifying mariners. Generally equipped with AIS and lights and using sonar to detect NARW, a sail drone could surveil each shipping channel during the calving season to alert mariners and resource agencies alike if a NARW is detected, eliminating the need for SSZs in shipping channels and allowing them to fall under DSZs when NARW are detected. If NOAA partnered with pilot groups to invest in this technology, it may be possible to eventually get a "sail drone" to follow each NARW throughout their migration and greatly reduce the risk of mortality or lethal injury.

III. Georgia Coastal Management Program - Unjustified Regulatory Burden:

Two aspects of the amendment, however, would unnecessarily impact coastal users since no scientific data has been provided to support that the proposed regulatory solution is likely to result in the reduction of the likelihood of mortality or serious injury to NARW from vessel strikes, rendering them arbitrary and capricious. The following items equate to unjust regulatory

⁶ Hain, J.H., Hampp, J.D., McKenney, S.A., Albert, J.A. and Kenney, R.O., 2013. Swim speed, behavior, and movement of North Atlantic right whales (*Eubalaena glacialis*) in coastal waters of northeastern Florida, USA. *PLoS one*, 8(1), p.e54340.

⁷ NOAA National Weather Service, 2022. Definitions for Marine Forecasts. Accessed from <https://www.weather.gov/gum/MarineDefinitions> on October 20, 2022.

⁸ U.S. Coast Guard, 2022. AIS Frequently Asked Questions. Accessed from <https://liwww.navcen.uscg.gov/ais-frequently-asked-questions> on October 20, 2022.

burdens without scientific evidence to indicate their implementation would reduce the likelihood of mortality or serious injury to NARW from vessel strikes.

a. Vessels to be Regulated:

NOAA estimates that the Rule, as proposed, could reduce NARW vessel strike mortality by 27.5%⁹. Speed and track data are not available for most vessels <65' in length because automatic identification systems (AIS) are not required by the U.S. Coast Guard, making these results unreliable. The actual risk reduction the proposal would achieve is uncertain given these large data gaps. NOAA and Georgia Department of Natural Resource (GDNR) records¹⁰ indicate that there have been 9 collisions between vessels <65' and NARWs that likely resulted in mortalities or serious injuries (MSIs):

- All known or suspected lethal collisions involved vessels likely >40';
- All known vessels had inboard engines and through-hull propellers;¹¹
- No cases involved vessels with outboard, inboard/outboard, or jet propulsion; and
- Of the vessels for which there is data, their drafts ranged from 3.3' to 7.4'

Therefore, it is arbitrary and capricious to impose regulatory burdens on all vessels 35' in length or greater, without scientific evidence that doing so will reduce the likelihood of mortality or serious injury to NARW from vessel strikes.

b. Temporal and Spatial Modifications to the Existing SMAs:

Available data indicate the occurrence of NARW south of Cape Hatteras in early November and in April is extremely low and does not justify an expansion of the SSZ [(Seasonal Speed Zone, formerly SMA (Seasonal Management Area)) dates.¹² Additionally, the western boundary of the proposed Southeast and South Carolina SSZs (the shoreline and COLREG lines) do not accurately reflect the distribution of NARW in Georgia and South Carolina. Most shallow waters within 1-2 nautical miles of the coastline are not good NARW habitat.^{13,14}

Therefore, it is arbitrary and capricious to impose regulatory burdens, without scientific evidence that doing so will reduce the likelihood of mortality or serious injury to NARW from vessel strikes in:

- The Southeast SSZ after March 31st;
- The South Carolina SSZ before November 15th or after March 31st; and

⁹ Garrison, LP., Adams, J., Patterson, E.M., and Good, C.P., 2022. Assessing the risk of vessel strike mortality in North Atlantic right whales along the U.S. East Coast. NOAA Technical Memo NMFS-SEFSC-757.

¹⁰ October 31, 2022 letter from Georgia Dept. of Natural Resources' Wildlife Resources Division, NMFS 2022-0022.

¹¹ Except for one 48' vessel that apparently had hull-mounted IPS drives

¹² Roberts, J.J., Schick, R.S., Halpin, P.N., 2002. Final Project Report: Marine Species Density Data Gap Assessments and Update for the AITT Study Area, 2020 (Opinion Year 4). Document version 2.2. Report. Unpublished.

¹³ Gowan, T.A. and Ortega-Ortiz, J.G., 2014. Winter habitat model for the North Atlantic right whale (*Eubalaena glacialis*) in the southeastern United States. PLoS One, 9(4), p. e95126.

¹⁴ Roberts, J.J., Schick, R.S., Halpin, P.N., 2022. Final Project Report: Marine Species Density Data Gap Assessments and Update for the AITT Study Area, 2022 (Opinion Year 4). Document version 2.2. Report. Unpublished.

- Areas westward (shoreward) of the 3 fathom (18') depth contour in Southeast and South Carolina SSZs, including shipping channels (Figures 1-3).

IV. Objection - Failure to Supply Sufficient Information:

The Georgia Coastal Management Program has determined that the regional consistency determination for amendments to the NARW Vessel Strike Reduction Rule, as proposed August 1, 2022, failed to supply sufficient information to justify impacts to coastal uses as necessary to achieve greater protection to coastal resources in the two areas listed below [15 CFR 930.43(b)]. The Program **objects** with the determination and requests the following information:

a. Vessels to be regulated:

Investigate the relationships between vessel length, draft, speed, mass and population type for vessels <65' to determine which classes of vessels pose the greatest risk to NARW prior to including vessels <40'; vessels <65' with outboards, inboard/outboards, or jet propulsion; and vessels <65' with shallow planning hulls in the amendments. Unless or until this information is provided, these vessels must remain exempt from the proposed amendments to minimize impacts to Georgia's coastal uses.

b. Temporal and Spatial Modifications to the Existing SMAs:

Provide temporal evidence that NARW are present in the Southeast and South Carolina SSZ between April 1st and April 15th, and present in the South Carolina SSZ between November 1st and November 14th, in numbers that pose a high risk of vessel strike mortalities. Additionally, provide spatial evidence that NARW are present between the 3-fathom line and the shoreline/COLREGS line off the coasts of Georgia and South Carolina in numbers that pose a high risk of vessel strike mortalities. Unless or until this information is provided, amend the Southeast and South Carolina SSZs to be active only between November 15th and March 31st and amend the western boundaries to align with the 3-fathom (18') depth contour, which is located approximately at the 3-mile State Waters mark in the Savannah and Brunswick Harbors, to minimize impacts to Georgia's coastal uses.

V. Coastal Effects and Enforceable Policies:

The regional consistency determination found that the vessel speed rule would affect waters uses, primarily by impacting transit times of vessels that lead to cost burdens, including commercial ships, cruise ships, tugs and tow boats, work and industrial vessels, recreational and commercial fishing vessels, passenger vessels (tour boats, charter fishing vessels, high-speed ferries), pilot boats, and recreational boats.¹⁵ However, no scientific evidence has been provided that these burdens on coastal uses will achieve the stated purpose of the amendments: to reduce the likelihood or mortalities and serious injured to endangered right whales from vessel strikes. Expansion of the existing rule in terms of spatial, temporal and vessel size, as proposed in the August 1, 2022 amendments, has not been justified as a successful way to meaningfully reduce impacts to NARW.

¹⁵ NMFS June 18, 2024 regional consistency determination, II. A. Coastal Effects and Management Implications

Ports are considered to be of regional benefit to coastal Georgia and result in a multi-county environmental, economic, social or cultural benefit.¹⁶ The ports and commercial waterways of Georgia represent major economic enterprises that meet the needs of waterborne commerce for both the coastal area and the entire state. Ports and commercial waterways also have a major national impact by providing a means of access to international and domestic markets. They are important elements in coastal management because they provide access to a variety of public resources – economic as well as historic, social and recreational.¹⁷ The safe navigation of the rivers, estuaries, and navigable channels of Georgia’s coast are important considerations for management, in conjunction with the protection of natural resources.¹⁸ Port operations and navigational safety would be impacted by the proposed amendments without providing justification to warrant such impacts.

The Georgia Constitution provides for the tradition of fishing to be preserved for the people¹⁹ and the right to fish has been codified as a valued part of the cultural heritage of the State. As an enforceable policy of the GCMP, the Game and Fish Code recognizes that fishing plays an essential role in the state’s economy. In recognition of this cultural heritage and the tradition of stewardship it embodies, and the import role of fishing in the state’s economy, the General Assembly has declared that Georgia citizens have to right to take fish.²⁰ Both recreational and commercial fishers would be impacted by the proposed amendments without providing justification to warrant such impacts.

VI. Next Steps:

The Georgia Coastal Management Program appreciates the complexity of balancing coastal uses and species protections in a way that will minimize impacts to the one while maximizing protections to the other. If you have any questions about our request for additional information, upon which this objection is based, we would like to attempt to resolve any differences at your earliest convenience [15 CFR 930.43(d)].

We look forward to continued discussion regarding the other 4 alternatives identified in the draft environmental assessment and/or other modifications to the amendments as currently proposed. If NOAA decides to proceed with the Preferred Alternative as described in the August 1, 2022 Amendments without providing the requested information you must notify us in writing before the project commences [15 CFR 930.43(e)].

¹⁶ Georgia Coastal Management Program Chapter VI. Uses Subject to Management, Section II., Activities of Regional Benefit.

¹⁷ Georgia Coastal Management Program Chapter VI. Uses Subject to Management, Section III. Activities Subject to Management, B. Transportation Facilities, Ports and Commercial Waterways, Policies: Game and Fish Code.

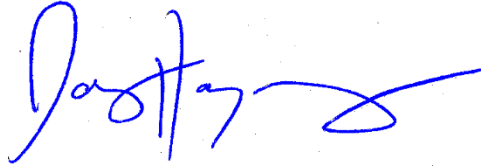
¹⁸ Georgia Coastal Management Program Chapter VII. Special Management Areas, Section I. Areas of Particular Concern, H. Navigational Channels.

¹⁹ Constitution of the State of Georgia, Article I. Bill of Rights, Section I. Rights of Persons, Paragraph XXVIII Fishing and Hunting.

²⁰ Game and Fish Code, O.C.G.A. 27-1-3(a).

Please feel free to contact Kelie Moore, Federal Consistency Coordinator, or me if we can be of further assistance.

Sincerely,

A handwritten signature in blue ink, appearing to read "Doug Haymans", with a stylized flourish at the end.

Doug Haymans, Director

DH/km

cc: Dr. Jeffrey Payne, Director, Office for Coastal Resources Management, NOS, NOAA
Jason Lee, GaDNR/WRD Wildlife Conservation Program Manager

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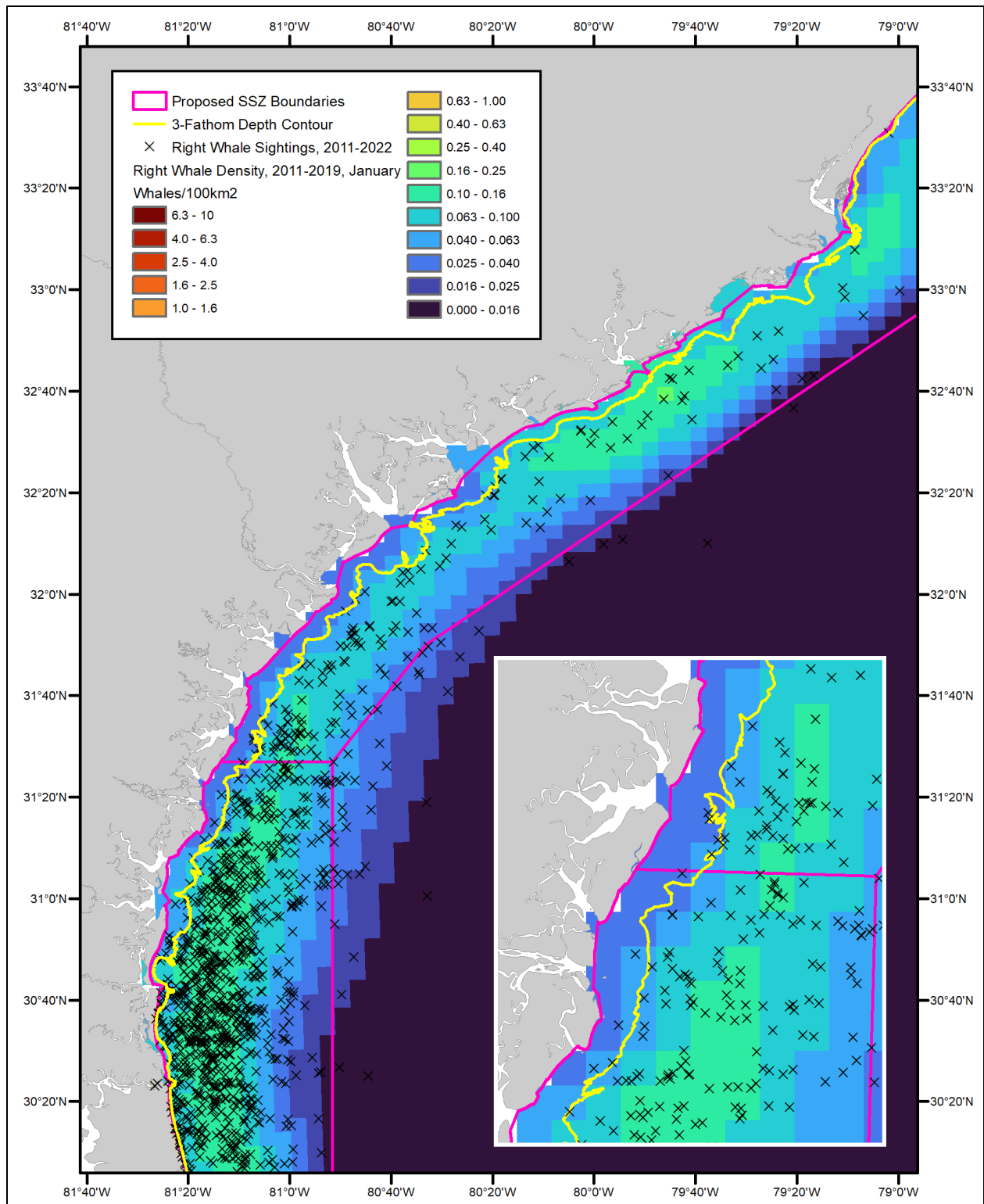


Figure 1. Density and sightings of NARWs are low west of the 3 fathom (18ft) depth contour. Whale density is for January 2011-2019 (Roberts et al. 2022). Whale sightings are from aerial survey platforms across all months, 2011-2022 (NARW Consortium data).

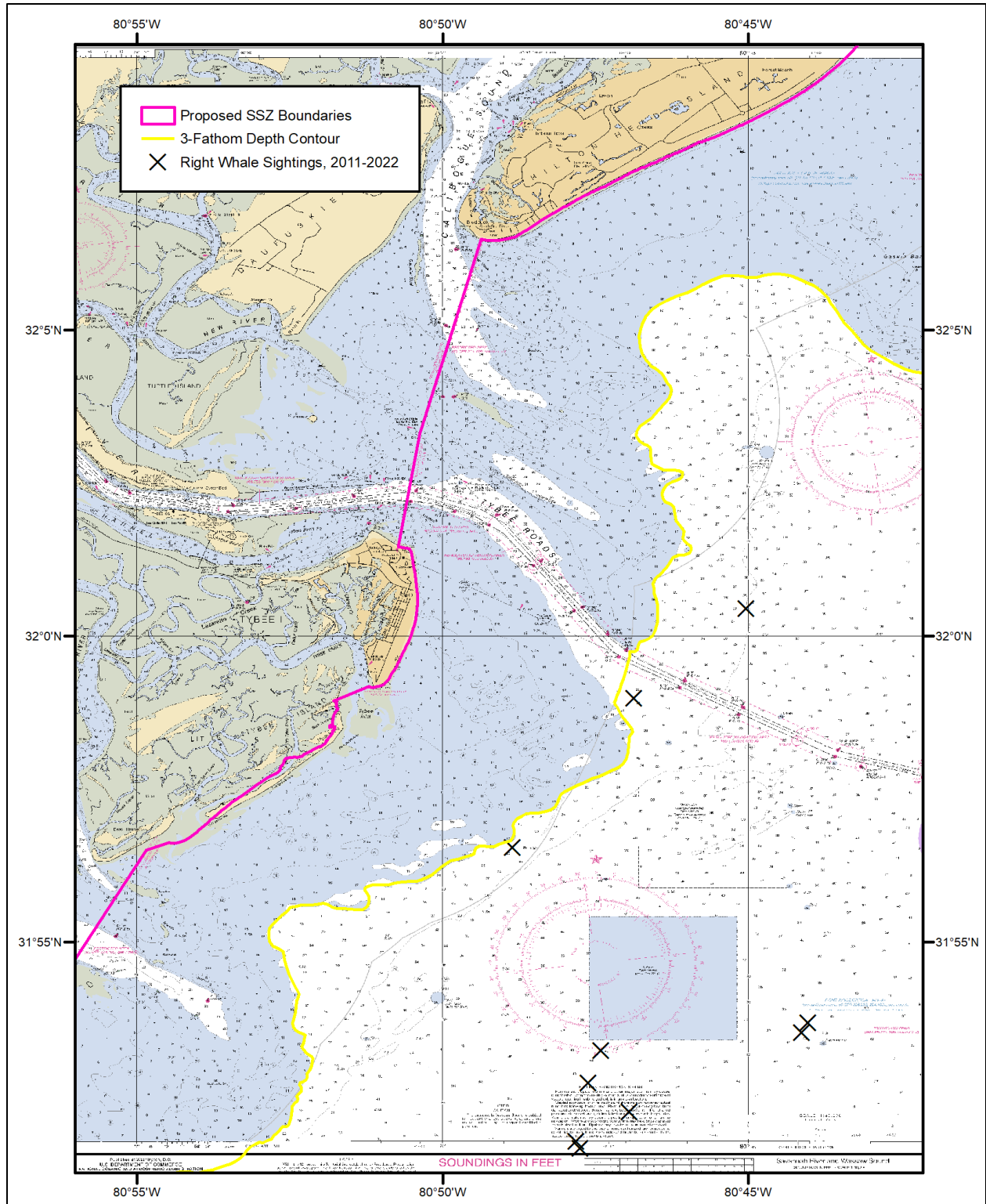


Figure 2. NOAA’s proposed SSZ boundary (magenta) and GDNR’s requested modification (yellow) around the Savannah River entrance.

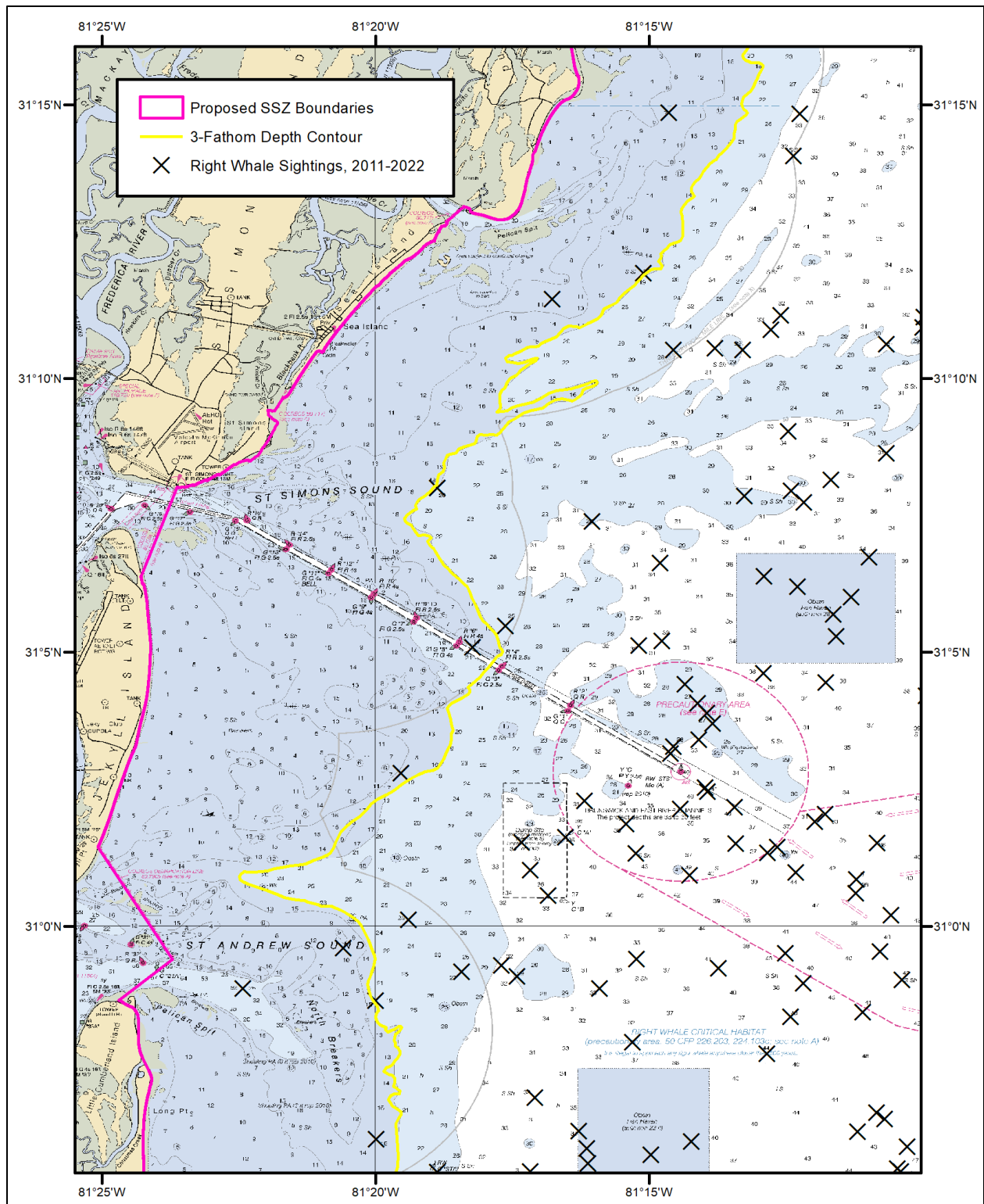


Figure 3. NOAA’s proposed SSZ boundary (magenta) and GDNR’s requested modification (yellow) around the Brunswick channel entrance. The greater number of whale sightings near Brunswick compared to Savannah is due to higher survey area in the Brunswick area.